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Supreme Court, U.S.
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No. 09-1434

In The

Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

v.

DANIEL RODRIGUEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 1327(a) of the Bankruptcy Code, which "bind" debtors and creditors to the provisions of a chapter 13 plan upon confirmation, negates the specific language of § 362(a) and § 362(b)(2)(B) of the Bankruptcy Code, which allows for the collection of child support payments from property that is not property of the estate?

2. Whether the Eleventh Amendment to the United States Constitution bars suit in federal court against a sovereign state by an individual, where the suit is based upon § 362 of the Bankruptcy Code, seeks to impose a liability on the state which must be paid from public funds in the state's treasury and is not for the purpose of marshalling bankruptcy estate assets or for the benefit of the estate?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	4
A. Factual Background	7
B. Proceedings Below	11
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES EXPRESSLY RECOGNIZED BY THIS COURT	15
A. Bankruptcy law should not be interpreted so as to interfere with the collection of domestic support obligations	15
B. Waiver of Eleventh Amendment immunity through the filing of a proof of claim does not extend beyond a bankruptcy court's *in rem* jurisdiction	19

TABLE OF CONTENTS – Continued

Page

II. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF §§ 362 AND 106(b) OF THE BANKRUPTCY CODE, AND IGNORES BASIC TENETS OF STATUTORY CONSTRUCTION 20

III. THE DECISION BELOW IS CAUSING TITLE IV-D AGENCIES TO CHANGE PROCEDURES FOR COLLECTING DOMESTIC SUPPORT OBLIGATIONS IN CHAPTER 13 BANKRUPTCY CASES WHICH WILL LEAD TO THE ISSUE PRESENTED EVADING FUTURE REVIEW 25

CONCLUSION 32

APPENDICES

Opinion of U.S. Court of Appeals for the Eleventh Circuit (Feb. 22, 2010) ..... App. 1

Order of U.S. District Court for the Southern District of Florida (June 12, 2009) ..... App. 12

Order of the U.S. Bankruptcy Court for the Southern District of Florida Granting Debtor's Motion for Contempt (Feb. 6, 2009) ..... App. 36

TABLE OF AUTHORITIES

Page

CASES

Ankenbrandt v. Richards, 504 U.S. 689 (1992).....4

Borman v. Raymark Indus., Inc., 946 F.2d 1031 (3d Cir.1991).....17

Central Virginia Community College v. Katz, 546 U.S. 356 (2006).....5, 6, 7, 19

Corley v. U.S., 129 S.Ct. 1558 (2009).....20, 23

Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974).....15, 19

Ex Parte Burrus, 136 U.S. 586 (1890).....4

Gardner v. State of New Jersey, 329 U.S. 565 (1947).....6, 7, 14, 19

Hibbs v. Winn, 542 U.S. 88 (2004) 20

In re Dagen, 386 B.R. 777 (Bankr. D. Colo. 2008) 12, 30

In re Fort, 412 B.R. 840 (Bankr. W.D. Va. 2009).....12, 30

In re Gellington, 363 B.R. 497 (Bankr. N.D. Tex. 2007) 2, 12, 30

In re Schroeder, 2009 WL 3526504 (Bankr. D. Neb.) 12, 30

In re Worland, 2009 WL 1707512 (Bankr. S.D. Ind.) 13, 30

Rose v. Rose, 481 U.S. 619 (1987).....18, 29

Ruckelhause v. Sierra Club, 463 U.S. 680 (1983).....20

TABLE OF AUTHORITIES – Continued

Page

United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988) 22, 23

United States v. Noland, 517 U.S. 535 (1996) 21, 23

Wetmore v. Markoe, 196 U.S. 68 (1904) ..... *passim*

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl.4 4

U.S. Const. amend. XI 11, 14, 15, 19, 24

11 U.S.C. § 106(b) ..... *passim*

11 U.S.C. § 362 ..... *passim*

11 U.S.C. § 362(b) 11, 12, 18, 20

11 U.S.C. § 362(b)(2) 28, 30

11 U.S.C. § 362(b)(2)(B) 3, 9, 17, 23

11 U.S.C. § 362(c) 3, 20, 23

11 U.S.C. § 362(h) 4, 6, 11

11 U.S.C. § 502(b)(5) 7

11 U.S.C. § 523 17

11 U.S.C. § 523(a)(5) 18

11 U.S.C. § 524(a)(2) 21

11 U.S.C. § 524(a)(3) 21

11 U.S.C. § 1141 17

11 U.S.C. § 1301 21

11 U.S.C. § 1327(a) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 1328 ..... 17, 22

11 U.S.C. § 1328(a)(2) 18

11 U.S.C. § 1329(c) 22, 23

28 U.S.C. § 151 11

28 U.S.C. § 157(b) 11

28 U.S.C. § 158(a)(1) 12

28 U.S.C. § 158(d)(1) 12

28 U.S.C. § 1254 1

42 U.S.C. § 654(3) 7

42 U.S.C. § 666(a)(9) 10

32 Stat. at L. 797, chap. 487 16

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (Pub.L. 109-8), (BAPCPA) 2, 4, 28

Title IV-D of the Social Security Act ..... *passim*

Fla. Stat. § 61.14(6) (2009) 10

Fla. Stat. § 409.2557(1) (2009) 7

MISCELLANEOUS

146 Cong. Rec. S11,683 (daily ed. Dec. 7, 2000) 27

S.Rep. No. 989, 95th Cong. 2nd Sess. (1978) 23

U.S. Government Accountability Office, Bankruptcy and Child Support Enforcement (2008) 14

PETITION FOR A WRIT OF CERTIORARI

The State of Florida, Department of Revenue, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the United States Bankruptcy Court for the Southern District of Florida, granting debtor's motion for contempt, (App. 36, *infra*), and the opinion of the United States District Court for the Southern District of Florida, affirming the bankruptcy court's order, (App. 12, *infra*), are unreported. The opinion of the Eleventh Circuit Court of Appeals, (App. 1, *infra*), is not officially reported but appears at 2010 WL 597224.

JURISDICTION

The judgment of the Eleventh Circuit was entered on February 22, 2010. (App. 1, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED[1]

11 U.S.C. § 106. Waiver of sovereign immunity

. . . .

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition . . . , operates as a stay, applicable to all entities, . . .

(b) The filing of a petition under section 301, 302, or 303 of this titie, . . . , does not act as a stay –

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[1] The bankruptcy petition in the underlying bankruptcy case was filed prior to October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (Pub.L. 109 8), (BAPCPA). All references to Code sections will refer to the Bankruptcy Code in effect on the date of the bankruptcy filing unless otherwise noted. The result of the decision of the Eleventh Circuit Court of Appeals remains unaffected by changes in the Bankruptcy Code as is emphasized by the Eleventh Circuit's reliance on a post-BAPCPA case, *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007), for its decision in the instant case.

. . . .

(2) under subsection (a) of this section –

. . . .

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

. . . .

(c) Except as provided in subsection (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title, concerning an individual or a case under chapter 9, 11, 12 or 13, of this title, the time a discharge is granted or denied.

. . . .

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.[2]

11 U.S.C. § 1327. Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

STATEMENT

Exclusive federal jurisdiction over uniform bankruptcy law[3] raises an important issue as to the extent to which bankruptcy law may interfere with a state's nearly exclusive jurisdiction over domestic relation matters.[4] This Court has recognized and defined the domestic relations exception to federal jurisdiction[5] and has clearly stated that bankruptcy law should not be a "means of avoiding enforcement" of child

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[2] Section 362(h) has been renumbered as section 362(k)(1). (BAPCPA).

[3] U.S. Const. art. I, § 8, cl.4.

[4] *Ex Parte Burrus*, 136 U.S. 586 (1890).

[5] *See Ankenbrandt v. Richards*, 504 U.S. 689, 703 n.6 (1992).

support obligations.[6] Congress was careful to provide specific exceptions for the collection of support obligations when drafting the injunction imposed by bankruptcy's automatic stay.[7] With these directives of this Court and Congress, the Eleventh Circuit Court of Appeals held that the general provisions of § 1327(a) of the Bankruptcy Code negate the specific exceptions drafted by Congress and can be used to enjoin post confirmation attempts to enforce child support obligations during a Chapter 13 bankruptcy case. The circuit court's ruling affirmed the district court's order which upheld the bankruptcy court's order sanctioning the State of Florida, Department of Revenue, (hereinafter, Florida DOR) for attempting to enforce a valid state court order of support.

Further, sovereign immunity is at issue because the collection of domestic support, in the instant case, was undertaken by the sovereign state of Florida. The action for damages by the individual debtor against the Florida DOR should have been dismissed because the action does not fall within the limited sphere of subordinated immunity identified by this Court in *Central Virginia Community College v. Katz*,[8] and there has been no waiver of immunity by the Florida DOR for a suit by an individual arising outside the bankruptcy court's *in rem* jurisdiction.

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[6] *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

[7] 11 U.S.C. § 362(b)(2)(B).

[8] *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

While the lower courts avoided an analysis of the *Katz* decision, they looked to this Court's decision in *Gardner v. State of New Jersey*,[9] and Congress' codification of the common law principles expressed by this Court in *Gardner*.[10] The lower courts failed to recognize that this Court in *Gardner* identified that bankruptcy law involves, at its core, *in rem* jurisdiction. The states waive immunity by filing a claim, only for actions founded upon a bankruptcy court's *in rem* jurisdiction.

In *Katz*, this Court noted that, not every law identified as a bankruptcy law could impinge upon state sovereign immunity.[11] The instant action is not an *in rem* action, but an action based upon § 362(h) of the Bankruptcy Code. An individual, and not the bankruptcy estate, may maintain a cause of action for damages pursuant to § 362(h). The immunity of the state is not waived for an action for damages maintained by an individual under the plain language of the Code, or under the common law principles of waiver identified by this Court. The Eleventh Circuit Court of Appeals failed to differentiate between an *in rem* action and one requiring personal and subject matter jurisdiction. The circuit court generally determined that the filing of a claim in bankruptcy waives immunity for any and all causes of action which is

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[9] *Gardner v. State of New Jersey*, 329 U.S. 565 (1947).

[10] 11 U.S.C. § 106(b).

[11] *Katz, supra* at 378 n.15.

inconsistent with the plain language of § 106(b) and the holdings of this Court in *Gardner* and *Katz*.

A. Factual Background

On January 13, 2005, Daniel Rodriguez, (hereinafter, Mr. Rodriguez), filed a voluntary petition for bankruptcy protection under Chapter 13 of the Bankruptcy Code. At the time of filing, Mr. Rodriguez owed $7,686.06 in child support arrearage to the custodial parent of his two minor children. Additionally, Mr. Rodriguez was responsible, post-petition, for paying $268.32 per month in ongoing child support obligations as ordered by a state court.

An initial Chapter 13 plan was confirmed on May 26, 2005. Mr. Rodriguez did not provide for his past due or his ongoing child support obligation in his initial plan. The Florida DOR, as a Title IV-D agency,[12] timely filed a claim for the child support arrearage on July 20, 2005. A claim for post petition child support was not filed by the Florida DOR. Claims for support obligations accruing post petition are not allowable under provisions of the Bankruptcy Code.[13]

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[12] The Florida DOR is the Florida agency responsible for enforcing child support orders in accordance with Title IV-D of the Social Security Act; Fla. Stat. § 409.2557(1) (2009); *see* 42 U.S.C. § 654(3).

[13] 11 U.S.C. § 502(b)(5).

Within four months of confirmation, Mr. Rodriguez became delinquent in his Chapter 13 plan payments to the trustee. On September 30, 2005, the Chapter 13 trustee filed a Motion to Dismiss Case together with a Notice of Delinquency in Chapter 13 Plan Payments. Thereafter, Mr. Rodriguez filed a motion to modify his plan together with a modified Chapter 13 plan which included provisions, not only for payment of his pre-petition obligation, but also for his ongoing child support obligation. The modified plan was confirmed on October 6, 2005. With the exception of payments received from the bankruptcy estate pursuant to the plan, all payments to the Florida DOR for his child support obligations were stopped.

Not long after the modified plan's confirmation, Mr. Rodriguez again became delinquent in his plan payments to the Chapter 13 trustee. The trustee filed a second Notice of Delinquency in Chapter 13 Plan Payments on March 28, 2006. Mr. Rodriguez' repeated delinquency in plan payments to the trustee caused ongoing child support payments to fall delinquent. The delinquency in child support payments caused the Florida DOR to mail a "Notice of Past Due Support" on April 3, 2006, to Mr. Rodriguez. Mr. Rodriguez became delinquent again in September, 2006.

On August 30, 2007, the bankruptcy court confirmed a second modified plan through which Mr. Rodriguez reduced payments for his on-going child support obligation to the amount of $134.16 per

month.[14] This amount represents one-half of Mr. Rodriguez' state court ordered obligation of $268.32 per month. Because of Mr. Rodriguez' reduction in current support payments being made through the bankruptcy estate, and his sporadic payments to the trustee, payments to the Florida DOR were not being made as ordered. Florida DOR mailed a "Notice of Appointment Regarding Past Due Support" to Mr. Rodriguez on November 1, 2007. Additionally, after the failure of Mr. Rodriguez to meet with the Florida DOR, the Florida DOR, on July 10, 2008, sent a Statement of Rights and Duties relating to an income deduction order to Mr. Rodriguez.

During the course of the sixty month bankruptcy, Mr. Rodriguez proposed to pay only $11,135.40 of the $16,099.20 of post petition, state court ordered child support. Because the Florida DOR sent notices in an effort to enforce the state court orders and collect the payment deficiency, Mr. Rodriguez, on August 22, 2008, filed a motion for contempt seeking damages against the Florida DOR. On November 10, 2008 an amended motion was filed. The Florida DOR filed responses to the original and amended motions

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[14] There is no indication that notice of the second modified plan was received by Florida DOR's attorneys. Even had notice been received, the attorney may not have objected based upon the belief that the automatic stay exception of § 362(b)(2)(B) would not curtail Florida DOR's ability to simultaneously collect from the individual debtor. Although the bankruptcy court has jurisdiction to reduce the bankruptcy estate's liability, it is without jurisdiction to alter debtor's individual liability.

disputing the violation of the bankruptcy stay as well as objecting to jurisdiction. The matter was heard on February 4, 2009. At the conclusion of the hearing, the bankruptcy court held the Florida DOR in contempt for mailing the three notices described above, and awarded sanctions. These sanctions rewarded Mr. Rodriguez for his successful efforts in using the bankruptcy process to defeat, either temporarily or permanently, his court ordered obligation to support his children. Based upon the bankruptcy court's holding, Mr. Rodriguez had successfully used the Bankruptcy Code to avoid payment of approximately $5,000.00 in child support obligations during the pendency of his bankruptcy case.[15] This was accomplished while the bankruptcy court protected Mr. Rodriguez from efforts to have him fulfill his state court ordered obligation. The district court and the Eleventh Circuit Court of Appeals affirmed the holding of the bankruptcy court.

Mr. Rodriguez did not complete payments in accordance with his Chapter 13 plan, and as a result, his bankruptcy case was dismissed on June 18, 2009. After dismissal, the Florida DOR resumed collection

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[15] States are required by 42 U.S.C. § 666(a)(9), to enact laws providing that child support payments are enforceable judgments by operation of law as each installment comes due, are entitled to full faith and credit in any other state, and are not subject to retroactive modification. *See* Fla. Stat. § 61.14(6) (2009).

of the child support obligation pursuant to state law and Title IV-D.

B. Proceedings Below

1. *The Bankruptcy Court.* The bankruptcy court, after hearing on debtor's motion for contempt, held that the Florida DOR violated § 362(a) of the Bankruptcy Code by mailing notices of past due child support to Mr. Rodriguez in an attempt to collect support obligations even though specific provisions of § 362(a) and (b) excepted the actions of the Florida DOR from the provisions of the automatic stay. The court awarded damages, and attorney fees pursuant to § 362(h). Additionally, the court held the Florida DOR waived any immunity to the instant action through the filing of its claim in the debtor's bankruptcy case. With the exception of Florida DOR's claim of Eleventh Amendment immunity, jurisdiction in the bankruptcy court was granted by 28 U.S.C. §§ 151 and 157(b).

2. *The District Court.* The district court on appeal affirmed the decision of the bankruptcy court explaining that § 1327(a) and § 362(b) of the Bankruptcy Code are irreconcilable and should be read to negate the effects of § 362(b). The district court disagreed that the Florida DOR violated the automatic stay but held that damages were proper pursuant to § 1327(a).[16] The district court additionally

[16] App. 31 n.3, *infra*.

affirmed the bankruptcy court's holding that the Florida DOR waived sovereign immunity.[17] Jurisdiction was granted to the district court by 28 U.S.C. § 158(a)(1).

3. *The Eleventh Circuit.* The court of appeals affirmed the district court order,[18] agreeing that § 1327(a) and § 362(b) are irreconcilable and that § 362(b) has no effect once a Chapter 13 plan is confirmed. The circuit court based its opinion almost entirely on a decision of the United States Bankruptcy Court for the Northern District of Texas,[19] and the opinion of the district court below. Jurisdiction was granted to the circuit court by 28 U.S.C. § 158(d)(1).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to settle important questions of federal law which impact the collection of domestic support obligations. The current ruling by the Eleventh Circuit Court of Appeals, as well as similar rulings by other lower courts in various jurisdictions,[20] has had a chilling effect on

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[17] App. 35, *infra*.

[18] App. 1, *infra*.

[19] *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007).

[20] *See In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007); *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009); *In re Schroeder*, 2009 WL

(Continued on following page)

efforts to enforce domestic support obligations by agencies mandated by Congress to assist in the enforcement of domestic support orders.

The first question that warrants the attention of this Court is what impact the Bankruptcy Code has on the collection of child support obligations. More specifically, does the Bankruptcy Code preclude child support enforcement by domestic support creditors, including Title IV-D agencies, once a Chapter 13 plan is confirmed? The decision of the Eleventh Circuit Court of Appeals conflicts with the basic principle set forth by this Court's holding in *Wetmore v. Markoe*, that general bankruptcy laws should not be interpreted so as to interfere with the enforcement of child support obligations.[21] In the instant case, the Eleventh Circuit Court found that the general provisions of § 1327(a) of the Bankruptcy Code shield debtors with confirmed Chapter 13 plans from child support enforcement. The court held that § 1327(a) negates the specific exceptions for the collection of support obligations which Congress placed in § 362 of the Bankruptcy Code. Currently in Florida, this ruling affects the collection of child support obligations from more than 2,500 non-custodial parents. The impact, in this individual case, was the inability to collect approximately $5,000.00 in current support obligations from Mr. Rodriguez over the course of his 5 year plan.

3526504 (Bankr. D. Neb.); and *In re Worland*, 2009 WL 1707512 (Bankr. S.D. Ind.).

[21] *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

In that the national average domestic support obligation arrearage claim is in excess of $9,000.00,[22] the ruling could impact efforts to collect child support obligations in amounts well in excess of $22 million in the state of Florida alone.

A second important question of federal law presented by the instant case is the extent to which a sovereign state waives Eleventh Amendment immunity by filing a proof of claim in a bankruptcy case. This Court identified that the filing of a claim in bankruptcy is a limited waiver of immunity.[23] The waiver this Court identified is limited to the extent necessary to determine the liability of the bankruptcy estate and is limited by a bankruptcy court's *in rem* jurisdiction over bankruptcy estate property. The Eleventh Circuit's decision extends the waiver to allow an individual to file suit against a sovereign state for damages to be paid from the state's treasury. The circuit court's holding extends well beyond the *in rem* jurisdiction this Court recognized in *Gardner,* and calls into question this Court's clear statement that "a suit by private parties seeking to impose a liability which must be paid from public funds in the

[22] U.S. Government Accountability Office, Bankruptcy and Child Support Enforcement (2008), p. 13.

[23] *Gardner v. State of New Jersey*, 329 U.S. 565 (1947).

state treasury is barred by the Eleventh Amendment."[24]

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES EXPRESSLY RECOGNIZED BY THIS COURT.

A. Bankruptcy law should not be interpreted so as to interfere with the collection of domestic support obligations.

This Court has recognized that the intersection of bankruptcy law and domestic support obligations must be approached cautiously, concluding that bankruptcy laws must not be interpreted to interfere with the collection of support obligations.

> The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has ever been the purpose of the law to enforce . . .
>
> Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means

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[24] *Edelman v. Jordan*, 415 U.S. 651, 663, *reh'g denied*, 416 U.S. 1000 (1974).

> of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children.[25]

The bankruptcy law, at the time of the *Wetmore* decision, was embodied in the Bankruptcy Act of 1898. This Court recognized that when Congress amended the Bankruptcy Act of 1898 in 1903, it approved the interpretation of bankruptcy law embraced by the courts, by including domestic support obligations in a short list of non-dischargeable debts.[26] The question of dischargeability raised by Wetmore involved a bankruptcy that was filed prior to the 1903 amendment. This Court determined that while the provision making domestic support nondischargeable had been added to the Act after the issue arose in the Wetmore bankruptcy, the added provision was not a change to the law but could "be merely declaratory of the true meaning and sense of the statute."[27] This Court held the support obligation non-dischargeable. This Court and Congress each gave deference to the obligation of parents to support their children.

The non-dischargeability of domestic support obligations was retained as a part of bankruptcy law in the enactment of the Bankruptcy Code in 1978. Additionally, domestic support obligations were made

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[25] *Wetmore v. Markoe, supra* at 77.

[26] 32 Stat. at L. 797, chap. 487.

[27] *Wetmore v. Markoe, supra* at 77.

one of only a few exceptions to the "super-discharge" granted to debtors filing and completing Chapter 13 bankruptcies under the Code, and the non-dischargeability of domestic support obligations remains an express part of the current Code.[28]

Prior to the 1978 enactment of the Bankruptcy Code, the only mention of domestic support obligations in bankruptcy statutes was the above-cited provision making domestic support obligations non-dischargeable. Prior to the 1978 Code, the bankruptcy stay was obtained through motion, implemented through clear and specific orders, and applied to actions against property of the bankruptcy estate.[29] The stay, under the Bankruptcy Act, did not affect the collection of domestic support obligations from the debtor or debtor's property and therefore, no exception to its application was necessary. Because the 1978 Code expanded protection to debtors and debtor's property through the provisions of bankruptcy's automatic stay,[30] Congress specifically provided that a bankruptcy filing does not stay "the collection of alimony, maintenance or support from property that is not property of the estate."[31] These exceptions are consistent with the concept of a domestic support creditor's freedom from bankruptcy law interference.

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[28] *See* 11 U.S.C. §§ 523, 1141 & 1328.

[29] *See Borman v. Raymark Indus., Inc.*, 946 F.2d 1031 (3d Cir.1991).

[30] 11 U.S.C. § 362.

[31] 11 U.S.C. § 362(b)(2)(B).

The principle set out by this Court more than one hundred years ago has been and continues to be supported by Congress in the drafting of the Bankruptcy Code and subsequent amendments thereto. Bankruptcy law should receive an interpretation that does not deprive children of the support and maintenance due them.[32] This principle, as expressed by this Court and Congress' clear language, has all but been ignored by the Eleventh Circuit Court of Appeals in its decision in the instant case. Although the instant action involves bankruptcy's automatic stay and not bankruptcy's discharge provisions, both are fundamentals of bankruptcy, protecting the debtor from the acts of creditors. Congress provides exceptions to each of these debtor protections for the collection of domestic support obligations.[33] Even with the clear directives Congress placed in the Code, the circuit court upheld the bankruptcy court's order sanctioning the Florida DOR for its efforts in trying to enforce child support obligations.

It is clear that the decision of the Eleventh Circuit Court of Appeals conflicts with principles expressed by this Court in the case of *Wetmore* on an

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[32] Cf. *Rose v. Rose*, 481 U.S. 619, 636-640 (1987) (O'Conner, J., concurring). Federal law barring attachment of veteran's benefits intended to protect veteran and his family from claims of creditors does not exempt veteran from family support obligations.

[33] 11 U.S.C. §§ 362(b), 523(a)(5), & 1328(a)(2).

important question of federal law. The conflict can best be resolved by this Court.

B. Waiver of Eleventh Amendment immunity through the filing of a proof of claim does not extend beyond a bankruptcy court's *in rem* jurisdiction.

The circuit court's decision also conflicts with this Court's rulings in *Gardner* and *Katz* and ignores a fundamental concept of sovereign immunity expressed by this Court in *Edelman*. "[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[34]

In drafting § 106(b), Congress codified the common law principles of waiver this Court identified in *Gardner*. Recognizing the bankruptcy court's limited jurisdiction, Congress clearly limited any waiver of immunity upon the filing of a proof of claim to causes of actions held by the bankruptcy estate. "A governmental unit that has filed a proof of claim ... is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate."[35] The Eleventh Circuit reads the limited waiver defined by Congress and expands its application to include suits against a governmental unit by individuals on their own behalf.

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[34] *Edelman*, *supra* at 663.

[35] 11 U.S.C. § 106(b).

The lower courts' expansion of the plain language of § 106(b) conflicts with this Court's holding that a waiver of immunity must be narrowly construed.[36]

In that the issue of immunity is a question of federal constitutional law, and that the Eleventh Circuit's ruling clearly conflicts with prior decisions of this Court, this Court should grant certiorari to finally resolve this matter.

II. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF §§ 362 AND 106(b) OF THE BANKRUPTCY CODE AND IGNORES BASIC TENETS OF STATUTORY CONSTRUCTION.

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[37] The Eleventh Circuit failed to follow this basic tenet of statutory construction when it upheld the district court in ruling that §§ 1327(a) and 362(b) of the Bankruptcy Code are irreconcilable and determined that § 1327(a) negates § 362(b).

The plain language of § 362(c) makes the provisions of the automatic stay applicable throughout a Chapter 13 case. Section 1327(a) binds debtor and

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[36] *See Ruckelhause v. Sierra Club*, 463 U.S. 680, 685 (1983).

[37] *Corley v. U.S.*, 129 S.Ct. 1558, 1566 (2009); citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

each creditor to the provisions of a confirmed plan. The Eleventh Circuit reads the word "bind" as imposing a second injunction. Congress knew how to impose an injunction and clearly did so through various Code sections.[38] Section 1327(a) contains no clear language imposing an injunction.

Congress made a policy choice when it chose to include injunctive language in certain sections of the Bankruptcy Code and omit it from others. This Court cautioned that the exercise of a bankruptcy court's equitable power "must not occur at the level of policy choice at which Congress itself operated in drafting the Code."[39] The bankruptcy court below operated at the level of making a congressional policy choice, when it used its equitable powers to sanction the Florida DOR for violating an injunction when the Bankruptcy Code did not provide specific injunctive language. The Eleventh Circuit upheld this improper use of the bankruptcy court's equitable powers.

The word "bind" as used in § 1327(a) does not create an injunction but, read naturally, creates two separate and distinct obligations. First, the debtor is obligated to pay to the estate the amount necessary to complete his plan as defined by the plan's provisions. Second, creditors are obligated to accept as full payment of the bankruptcy estate's liability for the creditors' allowed claims, no more than the amount

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[38] 11 U.S.C. §§ 362, 524(a)(2) & (3), & 1301.

[39] *United States v. Noland*, 517 U.S. 535, 543 (1996).

identified in the provisions of a confirmed plan. The word "bind" as used in § 1327(a) has no effect on the relationship or the obligations which exist between the individual debtor and each individual creditor. It is the bankruptcy discharge which alters the relationship between the debtor and his creditors after completion of the debtor's plan,[40] and it is the automatic stay which controls the relationship prior to the discharge. Only through understanding the interplay of each of the Bankruptcy Code provisions can the true meaning of each individual Code section be understood. "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[41]

In reading the Code in its entirety, one understands that a creditor may receive payment on an obligation provided for by a Chapter 13 plan from a source other than the bankruptcy estate. Congress provided for treatment of such a payment in § 1329(c). A modified plan may be confirmed to credit the bankruptcy estate for payments made to creditors on behalf of estate liability from sources other than the bankruptcy estate. Payments from other sources are rare because bankruptcy's automatic stay, defined in

[40] *See* 11 U.S.C. § 1328.

[41] *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988).

§ 362, remains in effect to protect debtors from collection efforts by creditors even after confirmation of a Chapter 13 plan.[42] Domestic support creditors have been excepted from many aspects of the automatic stay and therefore, may continue collection activity. If estate assets are affected, payment on the claim of the domestic support creditor may be reduced through presenting a modified plan for confirmation as provided for in § 1329(c) of the Bankruptcy Code. A reading of the related Code provisions as set out above gives meaning to all of the Bankruptcy Code provisions in question and is supported by the legislative history of § 362. "The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. . . . It permits the debtor to attempt a repayment or reorganization plan . . . "[43]

Reading § 1327(a) to negate the plain language of § 362(b)(2)(B), would also render §§ 362(c)(2)(C) and 1329(c) without effect. This result is not supported by the Code's plain language, cannons of statutory construction, or the legislative history of § 362. Interpreting the two sections so as to negate § 362, as the Eleventh Circuit has done, conflicts with this Court's directives relating to statutory construction set forth in the *Corley, Noland,* and *Timbers of Inwood Forest* decisions of this Court cited above.

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[42] *See* 11 U.S.C. § 362(c)(2)(C).

[43] S.Rep. No. 989, 95th Cong. 2nd Sess. (1978).

In addition to the issues raised by the lower courts' interference with the collection of state court ordered domestic support obligations, statutory language relating to a state's sovereignty was also ignored. The plain language of 11 U.S.C. § 106(b), naturally read, provides that the filing of a "proof of claim" by a governmental unit is a limited waiver of immunity extended only to the bankruptcy estate. Confusion in the courts appears to be based upon the juxtaposition of the phrases "proof of claim" and "claim . . . that is property of the estate."[44] A proof of claim establishes the liability of the bankruptcy estate. If the estate has a defense to the proof of claim filed, that defense is a "claim . . . that is property of the estate" and may be raised pursuant to the waiver of immunity. The debtor and the bankruptcy estate are separate entities. Therefore, while the filing of a proof of claim is a waiver of immunity as to a claim of the bankruptcy estate, it is not a waiver of immunity as to a claim of the individual debtor. The circuit court's holding that the waiver extends to the individual debtor is an impermissible expansion of the limited waiver defined by Congress.

The issues of the Bankruptcy Code's effect on the collection of domestic support obligations as well as Eleventh Amendment immunity are important questions of federal law which should be settled by this

[44] 11 U.S.C. § 106(b).

Court warranting the grant of certiorari review to resolve this matter.

III. THE DECISION BELOW IS CAUSING TITLE IV-D AGENCIES TO CHANGE PROCEDURES FOR COLLECTING DOMESTIC SUPPORT OBLIGATIONS IN CHAPTER 13 BANKRUPTCY CASES WHICH WILL LEAD TO THE ISSUE PRESENTED EVADING FUTURE REVIEW.

While the decision of the Eleventh Circuit Court of Appeals appears to be at conflict with previous decisions of this Court, and the decision of the Eleventh Circuit Court of Appeals contravenes the plain language of the Bankruptcy Code and ignores basic tenets of statutory constructions, the ability to review this matter based upon a conflict between circuits does not exist and may never arise. This Court should grant review based upon conflict with this Court's earlier decision, the important question of federal law, and the need for a final resolution to the question before it.

The Florida DOR, in an effort to comply with the ruling of the Eleventh Circuit Court of Appeals and avoid further sanctions in federal court, has sharply curtailed child support enforcement in Title IV-D cases once a debtor in bankruptcy has obtained confirmation of a Chapter 13 plan. The Florida DOR

believes the circuit court's ruling conflicts with this Court's *Wetmore* decision,[45] and congressional intent expressed in the plain language of the Bankruptcy Code excepting child support obligations from the specific injunctions created by Congress to protect bankruptcy debtors from ordinary creditors. Leaving the circuit court's decision in place means that preferences for child support obligations and exceptions to statutory injunctions, drafted and enacted by Congress, are diminished in scope, of limited value to support creditors, and subordinated to a debtor's Chapter 13 plan. In this case the Title IV-D agency was sanctioned by the bankruptcy court for attempting to enforce the periodic obligation owed by the debtor under a state court child support order.

It is important for domestic support creditors to know how a bankruptcy filing affects their collection activity. While it appears the Bankruptcy Code sets out to assist in the collection of support obligations, creative counsel have convinced courts that it is proper for bankruptcy courts to sanction domestic support creditors for taking actions against debtors. While the sanctioning of domestic support creditors is contrary to the plain language of the Code, and the Code's plain language expresses the intent of Congress, the lower court found conflict within provisions of the Code leading to an ambiguity. Where a statute is ambiguous, legislative history may help determine

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[45] *Wetmore v. Markoe, supra*.

congressional intent. In the instant case, a review of legislative history clearly supports a natural reading of the Code that does not interfere with the collection of support obligations through the state court process.

Congress employed the following basic principles in drafting the latest revisions to the Bankruptcy Code.

> 1. Bankruptcy should interfere as little as possible with the establishment and collection of on-going obligations for support, as allowed by State family law courts.
>
> 2. The Bankruptcy Code should provide a broad and comprehensive definition of support, which should then receive favored treatment in the bankruptcy process.
>
> 3. The bankruptcy process should insure the continued payment of on-going support and support arrearages with minimal need for participation in the process by support creditors.
>
> 4. The bankruptcy process should be structured to allow a debtor to liquidate non-dischargeable debt to the greatest extent possible within the context of a bankruptcy case and emerge from the process with the freshest start feasible.[46]

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[46] 146 Cong. Rec. S11,683, 11,705 (daily ed. Dec. 7, 2000). The language of the Bill debated in 2000 ending with the pocket veto of President Clinton was the same language included for

(Continued on following page)

The circuit court's reading of § 1327(a) to negate the express provisions of § 362(b)(2) of the Bankruptcy Code results in a decision which is contrary to the intent of Congress expressed through legislative history. While there is nothing in the Code to suggest the circuit court's ruling advances congressional intent, a reversal of the circuit court's ruling, gives meaning to all of the Bankruptcy Code provisions in question, is consistent with congressional intent to "insure the continued payment of on going support and support arrearages with minimal need for participation in the process by support creditors"[47] and maintains consistency with this Court's previous decisions.

State agencies throughout the country are conscious of costs and have been cutting back on expenses. The ruling of the circuit court below allows a debtor's Chapter 13 plan provisions to control the collection of domestic support obligations contrary to state court judgments and remedies available to state IV-D agencies and support creditors under state law. With 2,500 open active confirmed Chapter 13 cases in the files of the Florida DOR, and the number growing steadily, standard collection procedures in Chapter 13 bankruptcy cases, dependant on each individual plan, are virtually impossible. The only two options left for Florida, and in turn all domestic support creditors, are to eliminate all collection activities of domestic

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domestic support obligations contained in BAPCPA and signed into law by President Bush in 2005.

[47] Id.

support obligations outside of bankruptcy upon learning of a Chapter 13 filing, which is inconsistent with the mandates imposed upon Title IV-D agencies, or not to participate in Chapter 13 bankruptcy proceedings at all. While each choice would be successful at avoiding the possibility of sanctions, the amount collected for the children will necessarily be reduced while the cost to Title IV-D agencies would increase. Bankruptcy court rulings in many jurisdictions, as well as the circuit court's ruling in the instant case, are forcing child support creditors to make this choice.

In the instant case, no monies were received through the alleged violation of the bankruptcy's stay. The thirty thousand dollars ($30,000.00) in sanctions awarded in the instant case were purged,[48] and only attorney fees remain to be paid. The Eleventh Circuit Court of Appeals cited the dollar amount of damages in question as a minor consideration in the determination of whether courts should abstain from ruling in domestic relation related matters.[49] While the damages at issue appeared trivial to the circuit court, the real damage occurs not because of the monetary award assessed against the Florida DOR, but the support payments not received by Mr. Rodriguez' minor children. The Bankruptcy Code, in the instant case, has been interpreted to allow the debtor to avoid his obligation to support his children; something this Court said should never be done.[50] While

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[48] App. 31 n.3, *infra*.

[49] App. 10, 11, *infra*.

[50] Cf. *Rose v. Rose*, ibid.

the Florida DOR recognized the importance of challenging the bankruptcy court's decision in an effort to protect Mr. Rodriguez' children, the circuit court looked solely at the debtor-creditor relationship and upheld the lower court's ruling.

Similar results appear in decisions from other jurisdictions.[51] Unfortunately, most of the agencies responsible in the cited cases have avoided sanctions by returning funds to the debtor, and have changed collection procedures to avoid sanctions in the future. They chose to delay support payments to dependent children, with approval of the bankruptcy court, rather than expend the funds necessary to challenge the courts' reading of the Code. The loss is not to the Title IV-D agencies, but to the children who are owed support.

As stated earlier, the circuit court's decision impacts collections of support obligations in excess of $22 million dollars in Florida alone. Even though Congress has specifically exempted numerous collection activities by domestic support creditors from the automatic stay, the holding of the Eleventh Circuit that § 1327(a), in effect, enjoins domestic support creditors through negating § 362(b)(2) exceptions, requires staying all collection activity in Chapter 13

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[51] *See In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007); *In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009); *In re Schroeder*, 2009 WL 3526504 (Bankr. D. Neb.); and *In re Worland*, 2009 WL 1707512 (Bankr. S.D. Ind.).

cases. Not altering the collection activity in these cases would put domestic support creditors at risk for becoming liable for sanctions payable to a non-custodial parent who has used the Bankruptcy Code to avoid an obligation. This Court should give direction so that domestic support creditors know whether the Bankruptcy Code is to be used to assist in the collection of support obligations or whether it is to be used as a weapon by debtors against domestic support creditors which would cost children millions of dollars in lost or postponed support payments. Where do the children stand at the intersection of the Bankruptcy Code and state court ordered domestic support obligations?

Because of the important federal questions presented, the conflict with previous rulings of this Court and the possibility of the issue evading review, this Court's review is warranted. This Court should grant certiorari to resolve these matters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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2010 WL 597224 (C.A.11 (Fla.))

United States Court of Appeals,
Eleventh Circuit.
In re Daniel RODRIGUEZ, Debtor.
Florida Department of Revenue, Plaintiff-Appellant,
v.
Daniel Rodriguez, Defendant-Appellee.

No. 09-13222.

Feb. 22, 2010.

Frederick F. Rudzik, Florida Department of Revenue, Tallahassee, FL, for Plaintiff-Appellant.

Daniel Rodriguez, Hialeah, FL, pro se.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket Nos. 09-20863-CV-CMA, 05-10255-BKC-AJ.

Before DUBINA, Chief Judge, PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Florida Department of Revenue (hereinafter "the department") appeals the district court's order which affirmed an order of the bankruptcy court holding the State of Florida in contempt for sending debt-collection letters to Defendant-Appellee Daniel Rodriguez after Mr. Rodriguez had filed for Chapter 13 bankruptcy and the bankruptcy court had confirmed his Chapter 13 plan. Appellant claims that the district court misinterpreted the bankruptcy statutes, and that its

order was inequitable, violated the domestic relations exception to federal jurisdiction, and was barred by Eleventh Amendment immunity.

I. *BACKGROUND*

On January 13, 2005, Mr. Rodriguez commenced a voluntary Chapter 13 case and filed his Chapter 13 plan with the bankruptcy court in the Southern District of Florida. Rodriguez filed his Revised First Amended Plan on May 11 of that year and on May 25, the bankruptcy court confirmed that Revised First Amended Plan.

On July 20, 2005, the State of Florida filed a proof of claim in the amount of $7,686.06, representing Rodriguez' pre-petition child support delinquencies. Although the State did not file a post-petition request for payment for the post-petition child support obligation which would have come due during the pendency of the bankruptcy proceedings, on September 13, 2005, Rodriguez filed his First Modified Plan, which included a provision to make monthly payments on the post-petition child support obligation ordered by the State domestic relations court. The bankruptcy court entered an order approving the First Modified Plan on October 6, 2005. Rodriguez filed a Second Modified Plan on July 16, 2007, which included a provision for payment of only one-half of the continuing child support obligation as ordered by the State domestic relations court. The

bankruptcy court approved this plan on August 30, 2007.

Acting in its capacity as a Child Support Collections Agency, the department sent three letters to Rodriguez during the course of his bankruptcy. The first letter was mailed on April 3, 2006, and was entitled "Notice of Past Due Support." The second letter was mailed November 1, 2007 and was entitled "Notice of Appointment Regarding Past Due Support." The third letter was dated July 10, 2008 and was entitled "Statement of Rights and Duties: Income Deduction." In response to these letters, Rodriguez filed a motion for contempt against the State in the bankruptcy court, claiming that the letters violated the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a), and seeking attorney's fees and punitive damages against the State for its actions in sending the letters.

After a hearing on the matter, the bankruptcy court concluded that the State's actions did violate the automatic stay and granted Rodriguez's motion for contempt. Although the bankruptcy court declined to impose any punitive damages against the State, it did grant attorney's fees to Rodriguez for expenses incurred trying to fend off the State's collection actions. In addition, the court imposed a fine against the State of $10,000 for each of the three stay violations, but held that the State could purge this fine by not sending any further letters to Rodriguez in violation of the stay.

The State appealed the bankruptcy court's order to the district court, asserting that the bankruptcy court misinterpreted the bankruptcy code and that, even if it did violate the automatic stay provision, Eleventh Amendment immunity barred enforcement of the bankruptcy court's order. The district court rejected the State's arguments. First, the district court held that, although the State did not violate the automatic stay provisions (because those provisions contained an exception for collection of child support), it did violate the terms of Rodriguez' confirmed plan and, therefore, the State was in contempt of the bankruptcy court's order. Second, the district court concluded that, by filing its claim, the State waived sovereign immunity and was subject to liability. This appeal followed.

II. *ISSUES*

I. Whether the district court erred in affirming the bankruptcy court's order sanctioning the State of Florida based upon its finding that the State violated the debtor's confirmed plan and was therefore in contempt.

II. Whether the bankruptcy court is without jurisdiction to interfere with state court orders regarding the debtor's child support obligations.

III. Whether Eleventh Amendment immunity bars the instant action.

III. *STANDARD OF REVIEW*

Determinations of law made by either the bankruptcy court or the district court are reviewed by this court de novo. *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir.1992). The bankruptcy court's factual determinations are subject to review under the clearly erroneous standard. *Id.* A district court is not authorized to make independent factual findings. *Id.* (citing *In re Sublett*, 895 F.2d 1381, 1383-84 (11th Cir.1990)).

IV. *DISCUSSION*

The district court held that, while the State did not violate the automatic stay provisions of 11 U.S.C. § 362(a), it nonetheless violated the terms of Rodriguez's confirmed plan and, therefore, the bankruptcy court did not commit error in finding the State in contempt and awarding attorney's fees. We agree.

Title 11 U.S.C. § 362(a) provides that, subject to certain exceptions, the filing of a bankruptcy petition operates as a stay, applicable to all entities of, among other things, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). If no exception applied in this case, the State's action in sending three collection letters to Rodriguez during the pendency of his bankruptcy would clearly have violated the automatic stay provision of § 362(a). However, an exception does apply: § 362(b)(2)(B), which excepts "the collection of a

domestic support obligation from property that is not property of the estate." This exception applies here because, pursuant to 11 U.S.C. § 1327(b), after Rodriguez's plan was confirmed by the bankruptcy court, all of Rodriguez's property not necessary to fulfill the requirements of the plan was revested with Rodriguez personally as a matter of law. 11 U.S.C. § 1327(b); *Telfair v. First Union Mortgage Corporation*, 216 F.3d 1333, 1340 (11th Cir.2000). Therefore, subsequent to confirmation, the property was "not property of the estate" and subject to the § 362(b)(2)(B) child support exception. Accordingly, the State did not violate the automatic stay provision of § 362(a).

However, this does not end the inquiry. As the district court held, § 362 does not exist in a vacuum and must be read alongside various other portions of the Bankruptcy Code. Title 11 U.S.C. § 1327 addresses the effects of the confirmation of a bankruptcy plan. That statute provides in part:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1327(a). Under this provision, once a bankruptcy plan is confirmed, the debtor and each creditor is bound by its terms. Here, the State violated the confirmation order by asserting an interest other than those provided for in the plan after

confirmation. *In re Gellington,* 363 B.R. 497, 502 (Bankr.N.D.Tex.2007).

In *In re Gellington,* the State garnished the wages of a debtor owing child support subsequent to the debtor's Chapter 13 bankruptcy plan being confirmed by the bankruptcy court. *Id.* The court found that, while the State was not in violation of the automatic stay because of the § 362(b)(2)(B) exception, it was in violation of the confirmation order as it was bound by its provisions pursuant to § 1327(a). *Id.* The court in *In re Gellington* rejected the State's argument that it was acting properly under the § 362(b) exception, holding that "after confirmation, the terms of the plan and the confirmation order control." *Id.* As noted by the district court, the same result is warranted in this case – although the State cannot be said to have violated the automatic stay provision of § 362(a) because of the child support exception to that statute, it did violate the terms of Rodriguez's bankruptcy plan, as confirmed by the bankruptcy court. Because the State, like all creditors, was bound by the terms of the confirmed plan pursuant to § 1327(a), we conclude that the bankruptcy court did not err in granting Rodriguez's motion for contempt.

In its order affirming the bankruptcy court, the district court found that Sections 1327 and 362 are irreconcilable. The district court's reasoning was as follows: Prior to confirmation, a child support creditor is unable to attempt to collect child support from the debtor because, prior to confirmation, all property is

the property of the bankruptcy estate and § 362(b) allows for an exception for the stay only as to funds which are not part of the bankruptcy estate. Although § 1327(b), which provides that following confirmation property revests with the debtor, allows a child support creditor to seek collection from the debtor, § 1327(a) forbids collection of any debt not confirmed by the plan. The district court concluded, therefore, that the exception in § 362(b) cannot coexist with the confirmation effects of § 1327(a). The district court went on to note that, because the 1994 amendments to the Bankruptcy Code provided that a Chapter 13 plan must provide for any support obligations due to the debtor, there was no need for the § 362(b)(2)(B) child support exception and that the exception was somewhat superfluous. This finding is supported by case law from this court. In *Carver v. Carver,* 954 F.2d 1573 (11th Cir.1992), for instance, this court held that, based on the statutory scheme, the § 362(b)(2) exception "has little or no practical effect in Chapter 13 situations." *Id.* at 1577. Accordingly, the district court's analysis is sound.

The State argues that, even if it violated the confirmed plan, the bankruptcy court should have abstained from getting involved in this matter because it involves domestic affairs, a matter normally left to the states. The State cites *Carver,* where this court held: "It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established

expertise in such matters.'" 954 F.2d at 1579. We agree with the district court that, while it has historically been the case that domestic affairs belong to the laws of the states, it is clear that Congress intended for the federal courts, through the Bankruptcy Code, to address the payment of domestic support obligations. As noted by the district court, this does not mean that the bankruptcy court determines the amount of support, or any other details of the domestic affairs; those remain governed by the state courts. "Nevertheless, the Bankruptcy Code provides for the payment of those obligations, as a priority, under the debtor's Plan." District Court Order at 13.

Although this court declined to get involved in a matter of domestic affairs in *Carver*, the case for abstention was considerably stronger in that case than it is here. In *Carver*, we noted that, although the debtor was subject to a suit while seeking bankruptcy protection, much of the situation was of his own making, and that he had arreared several times in the past. *Id.* at 1580. We held that under those circumstances, "the interests of comity weigh[ed] heavily in favor of abstention." *Id.* Those factors are not present in this case. We went on to hold that, in *Carver*, "it [was] clear that the Bankruptcy Court . . . was being used as a weapon in the ongoing dispute between [the Carvers]." *Id.* Again, this factor is not present here. Finally, in *Carver*, the appellants were found to have willfully violated the automatic stay under § 362 and fined over $18,000. In this case, although the State was fined, the court held that it could purge the fine

by ceasing to send collection letters to Mr. Rodriguez. The only actual monetary reward was that of reasonable attorney's fees. Accordingly, while we are mindful that abstention is sometimes appropriate when dealing with matters of family law such as the payment of child support, we find that such abstention was not necessary in this case.

Finally, the State argues that Eleventh Amendment immunity protects it from liability. The district court rejected this argument and held that, once the State filed its proof of claim, it waived its sovereign immunity as a matter of law. We agree. Title 11 U.S.C. § 106(b) provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

Under this statute, we conclude that the State waived its sovereign immunity defense with respect to the claim at issue here, which arose out of the same transaction or occurrence of which the State's claim arose. In its brief, the State argues that § 106(a) is unconstitutional. The State is correct that, in *In re Crow,* 394 F.3d 918, 924 (11th Cir.2004), this court held that, because Congress may not abrogate state sovereignty pursuant to its Article I Bankruptcy Clause powers, and because § 106(a) was not validly enacted pursuant to its powers under § 5 of the

Fourteenth Amendment, § 106(a) was unconstitutional. *Id.* The problem with the State's constitutional argument, however, is that the district court's finding of waiver was based on § 106(b), not § 106(a)'s "forced abrogation" provision. As is obvious from subsequent decisions, our holding in *Crow* did not affect the applicability of § 106(b). *See, e.g., In re Omine,* 485 F.3d 1305, 1316 (11th Cir.2007). Accordingly, we agree with the district court that the State's filing of its proof of claim in this case had the effect of waiving its sovereign immunity as to the claim at issue.

In sum, we agree with the district court's finding that the State violated the terms of Rodriguez's confirmed plan and, therefore, that the bankruptcy court's finding of contempt and award of attorney's fees was appropriate. We further agree that the bankruptcy court was correct in declining to abstain from deciding this matter. Finally, we agree with the district court that, under § 106(b), by filing its proof of claim in this case, the State waived its defense of sovereign immunity. For these reasons, we affirm the district court's order affirming the bankruptcy court's order holding the State of Florida in contempt.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 09-20863-CIV-ALTONAGA

In re:

DANIEL RODRIGUEZ,

Debtor.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellant,

vs.

DANIEL RODRIGUEZ,

Appellee. /

ORDER

This matter came before the Court upon appeal by Appellant, State of Florida Department of Revenue, from the bankruptcy court's February 6, 2009 Order Granting Debtor's Motion for Contempt in the case styled *In re Daniel Rodriguez*, Case No. 05-10255-AJC. The Court has carefully considered the parties' written submissions, pertinent portions of the record, and applicable law.[1]

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[1] Appellee, Daniel Rodriguez, did not file a response brief.

I. BACKGROUND

On January 13, 2005, Appellee/Debtor, Daniel Rodriguez ("Rodriguez"), commenced a voluntary Chapter 13 case and filed his Chapter 13 plan. On April 26, 2005, Rodriguez filed his First Amended Chapter 13 Plan and on May 11, 2005, he filed a Revised First Amended Plan. On May 25, 2005, the bankruptcy court confirmed Rodriguez's First Amended Chapter 13 Plan.

On July 20, 2005, the State of Florida filed its Proof of Claim in the amount of $7,686.06, representing Rodriguez's pre-petition child support delinquencies. The claim did not include the continuing post-petition interest due on the pre-petition non-dischargeable child support obligation or Rodriguez's ongoing post-petition obligation.

On September 13, 2005, Rodriguez moved to modify his Plan after confirmation and filed his First Modified Chapter 13 Plan. Although the State had not filed a post-petition request for payment for the post-petition child support obligation which would have come due during the pendency of the bankruptcy proceedings, Rodriguez's First Modified Plan included a provision to pay the post-petition child support obligation of $268.32 ordered by the State domestic relations court to be paid each month. On October 6, 2005, the bankruptcy court entered an order approving the First Modified Plan.

Thereafter, on July 16, 2007, Rodriguez filed his Second Motion to modify plan and his Second

Modified Chapter 13 Plan. On August 30, 2007, the bankruptcy court approved Rodriguez's Second Modified Chapter 13 Plan. The Second Modified Plan included a provision for payment of only one-half of the continuing child support obligation as ordered by the State domestic relations court, $134.16, commencing with the March 2008 payment.

Acting in its capacity as a Child Support Collections Agent pursuant to Title IV-D of the Social Security Act, the Florida Department of Revenue sent three letters to Rodriguez during the course of his bankruptcy. The first letter, mailed April 3, 2006, is entitled "Notice of Past Due Support." The second letter, mailed November 1, 2007, is entitled "Notice of Appointment Regarding Past Due Support." The third letter is dated July 10, 2008 and is entitled "Statement of Rights and Duties: Income Deduction."

Rodriguez filed a Motion for Contempt against the State of Florida Child Support Division (the "Division") in the bankruptcy court on August 21, 2008, and an Amended Motion for Contempt on November 10, 2008. In his Amended Motion, Rodriguez sought attorney's fees and punitive damages against the Division for its actions in sending the letters to Rodriguez regarding his past due child support payments. Those letters, according to Rodriguez, violate the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 326(a).

The bankruptcy court held a hearing on the Motion on February 4, 2009, at which time it found

the Division in contempt. During the hearing, the bankruptcy court stated:

> I think I am persuaded by the debtor's argument that the modification under 1327 binds and trumps Section 362, and we won't get into the issue of whether or not this was an appropriately reduced payment or not.
>
> * * *
>
> [T]he Court still agrees with the idea that – with the notion that creditors cannot make an end-run around the plan when it's in effect and so, therefore, this item here may be curable and not binding, but I still don't believe that it gives the state the right under 362(b) to go out and start doing independent activities outside of the bankruptcy.

(Transcript of Hearing held on February 4, 2009 ("*Hearing*") [D.E. 3] at 32-33). The court declined to impose any punitive damages against the Division, but granted attorney's fees to Rodriguez for expenses incurred trying to fend off the Division's collection actions. Following the hearing, the bankruptcy court entered an Order Granting Debtor's Motion for Contempt, in which the court held, "for reasons stated on the record," that the State of Florida had "violated the automatic stay on three occasions by virtue of the three (3) letters it sent to the Debtor." (Order Granting Debtor's Motion for Contempt ("*Order*") [D.E. 1] at 8).

The Division filed the instant appeal of the bankruptcy court's Order, raising three issues on appeal:

> I. The plain language of 11 U.S.C. § 362(b)(2), excepting from the automatic stay actions to collect child support from property other than property of the estate, allows the actions of appellant in the instant case;
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> II. The court's belief that 11 U.S.C. § 1327 "trumps" 11 U.S.C. § 362(b)(2) renders 11 U.S.C. § 362(c) and 11 U.S.C. § 1329(a)(3) meaningless and additionally causes concern relating to federal jurisdiction in domestic relation matters and is therefore not supported by the canons of statutory construction; and
>
> III. Eleventh Amendment immunity bars the instant action. (Appellant's Initial Brief ("*Appellant's Brief*") [D.E. 11] at 6).

II. STANDARD OF REVIEW

District courts sit as appellate courts over bankruptcy decisions. *Miner v. Bay Bank & Trust Co. (In re Miner)*, 185 B.R. 362, 365 (N.D. Fla. 1995), *aff'd*, 83 F.3d 436 (11th Cir. 1996). The bankruptcy court's findings of facts should not be set aside unless they are clearly erroneous. *Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990). The burden to show that such factual findings are clearly erroneous lies with the appellant. *Acquisition Corp. of Am. v. Fed. Sav. & Loan Ins. Corp.*, 96 B.R. 380, 382 (S.D. Fla. 1988). A

finding of fact is not clearly erroneous unless "this court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been committed." *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs.)*, 408 F.3d 689, 698 (11th Cir. 2005) (internal citations omitted). Conclusions of law, on the other hand, are reviewed on a *de novo* basis. *In re Englander*, 95 F.3d 1028, 1030 (11th Cir. 1996); *Olympia & York Fla. Equity Corp. v. Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d 873, 879 (11th Cir. 1990). Further, mixed issues of law and fact, and "ultimate facts" are all subject to *de novo* review. *In re Chase & Sanborn Corp.*, 904 F.2d at 593; *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990).

III. ANALYSIS

A. The Plain Language of 11 U.S.C. § 362(b)(2)

The Division first argues that the plain language of 11 U.S.C. § 362(b)(2) allowed the attempted collection actions against Rodriguez. Section 362(a) sets forth the overall stay provisions:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 U.S.C. §§ 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 U.S.C. § 78eee(a)(3)], operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
>
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

11 U.S.C. § 362(a).

Section 362(b) provides exceptions to the automatic stay:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –
>
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> (2) under subsection (a) –
>
> (A) of the commencement or continuation of a civil action or proceeding

> (i) for the establishment of paternity;
>
> (ii) for the establishment or modification of an order for domestic support obligations;
>
> (iii) concerning child custody or visitation;
>
> (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
>
> (v) regarding domestic violence;
>
> (B) of the collection of a domestic support obligation from property that is not property of the estate. . . .

11 U.S.C. § 362(b).

Finally, Section 362(c) governs the duration of the stay:

> (c) Except as provided in subsections (d), (e), (f), and (h) of this section –
>
> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

> (2) the stay of any other act under subsection (a) of this section continues until the earliest of –
>
> (A) the time the case is closed;
>
> (B) the time the case is dismissed; or
>
> (C) if the case is a case under chapter 7 of this title [11 U.S.C. § 701 *et seq.*] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 U.S.C. § 901 *et seq.*, 1101 *et seq.*, 1201 *et seq.*, or 1301 *et seq.*], the time a discharge is granted or denied. . . .

11 U.S.C. § 362(c).

The effect of these sections as relevant to this case is that upon the filing of a bankruptcy petition, a stay goes into effect as to the property of the debtor and the estate, such that creditors may not initiate judicial or other proceedings to obtain such property. *See* 11 U.S.C. § 362(a). An exception to the stay applies for the collection of domestic support obligations, so long as the property collected from is not property of the estate. *See* 11 U.S.C. § 362(b)(2)(B). Finally, the stay remains in effect only as long as the property in question remains property of the bankruptcy estate or when the case closes, is dismissed, or discharged. *See* 11 U.S.C. § 362(c).

The Court agrees with the Division that the plain language of section 362(b)(2)(B) allows the holder of a

child support obligation against a debtor to proceed against the debtor in spite of the filing of a Chapter 13 petition. However, as the bankruptcy court determined, section 362(b)(2)(B) does not exist in a vacuum, but must be read alongside various other portions of the Code. Viewing the various sections together, the bankruptcy court determined, and the undersigned agrees, that the Division was prohibited from pursuing any actions against Rodriguez outside Rodriguez's confirmed Chapter 13 Plan. The Court now addresses the basis for that conclusion.

B. The Interplay Between 11 U.S.C. § 1327 and 11 U.S.C. § 362

Section 1327 addresses the effects of the confirmation of a bankruptcy plan.

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of

> any claim or interest of any creditor provided for by the plan.

11 U.S.C. § 1327.

Section 362 thus would appear to protect a debtor's post-confirmation earnings whereas section 1327(b) would vest the earnings in the debtor, while divesting them of the protection of section 362(a). *Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000). In resolving the apparent conflict created, courts are in disagreement as to the status of property before and after confirmation of a plan:

> In resolving this conflict, courts have adopted one of three models: the estate termination approach, the estate preservation approach, and the estate transformation approach. Under the estate termination approach, all property of the estate becomes property of the debtor upon confirmation and ceases to be property of the estate. *See In re Petruccelli*, 113 B.R. 5, 15 (Bankr.S.D.Cal.1990). According to the estate preservation approach, all property of the estate remains property of the estate after confirmation until discharge, dismissal, or conversion. *See In re Kolenda*, 212 B.R. 851, 853 (W.D. Mich.1997). A compromise between these two extremes is struck by the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. *See In re Heath*, 115 F.3d

> 521, 524 (7th Cir.1997); *In re McKnight*, 136 B.R. 891, 894 (Bankr.S.D.Ga.1992).

Id. The Eleventh Circuit has adopted the "transformation" approach, determining that while the filing of a petition places all property of the debtor in control of the bankruptcy court, section 1327(b) returns all property to the debtor that is not necessary to fulfill the requirements of the plan. *Id.*

The interplay between sections 326 and 1327 is again at issue in this case. The bankruptcy court determined that section 1327 "trumps" section 326(b), such that the exception from the automatic stay for child support payments has no effect after a plan is confirmed because all creditors are bound by the terms of the plan upon confirmation pursuant to section 1327(a). (*See Hearing* at 32-33). As stated, courts interpreting the interplay between the two sections have reached contradictory conclusions.

In *In re Adams*, 12 B.R. 540, 541 (Bankr. D. Utah 1981), the court explained that a Chapter 13 petition initially brings essentially all property of the debtor into the bankruptcy estate, such that "[a]t that point there is virtually no property of the debtor available to the ex-spouse attempting to collect a debt for support under the exception of Section 362(b)(2)." The court went on to note that "[c]ircumstances change, however, upon the confirmation of a plan." *Id.*

> Under these provisions [section 1327], the expansive definition of "property of the estate" found in Section 1306 is pruned

> dramatically at confirmation. Any property which has not been designated in the plan or order of confirmation as necessary for the execution of the plan revests in the debtor, under Section 1327(b), to become "property of the debtor." Thus, all wages over and above those paid to the trustee or creditors under a plan, and any property which the debtor does not propose to use in funding his plan returns to the debtor and becomes subject to the reach of his ex-spouse under Section 362(b)(2). Therefore, although the ex-spouse's collection action is initially held at bay by the breadth of the Section 1306 estate, once confirmation occurs, a more equitable balance is struck between the needs of the debtor to rehabilitate himself and those of his dependents seeking lawful support.

Id. at 542 (internal footnote omitted).

Similarly, in *In re Pacana*, 125 B.R. 19 (B.A.P. 9th Cir. 1991), the court found that although section 1327 ostensibly binds all creditors to the terms of the plan, the exception created by section 362(b)(2)(B) allows a child support creditor to collect from the debtor outside of the plan.

> [Section] 362(b)(2) specifically excepts from the automatic stay "the collection of alimony, maintenance, or support from property that is not property of the estate. . . ." *See In re Stringer*, 847 F.2d 549 (9th Cir. 1988). Since under § 1327(b), "the confirmation of a plan vests all of the property of the estate in the debtor," the effect of § 362(b)(2) is to except

> from the automatic stay any efforts to collect child support obligations owed by the debtor.

Id. at 22 (internal footnote omitted).

Other courts have reached the opposite result. In *In re Durant*, 239 B.R. 859, 872 (Bankr. N.D.N.Y. 1999), the bankruptcy court held that one holding a child support claim against a debtor is bound by the terms of the plan once confirmed and may not seek to collect on the debt outside of the plan. "Thus, the holders of support claims are 'creditors' bound by the confirmed plan under § 1327(a) just as are other creditors." *Id.* (internal footnote omitted).

The court in *In re Dagen*, 386 B.R. 777 (Bankr. D. Colo. 2008), reached a similar conclusion. The court initially acknowledged that section 326(b) creates an exception from stay provisions to child support claims as to property that does not belong to the bankruptcy estate. *Id.* at 783. The court further acknowledged that upon confirmation of the plan, property revests in the debtor, is no longer protected by the automatic stay provisions, and is therefore collectable for child support obligations. *Id.* The court went on to find, however, that the provisions of section 1327(a) operate as a bar to any collections on the child support obligations:

> According to § 1327(a), "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to,

> has accepted, or has rejected the plan." Once confirmed, it was the Plan, not the automatic stay, that halted any further attempt to collect the prepetition debt. By the terms of the Plan, Mrs. Dagen was contractually obligated to accept distributions from the Chapter 13 trustee in satisfaction of her prepetition claims.

Id.

At first blush, it appears illogical that section 1327(a) should essentially negate the exception created by section 362(b)(2), particularly when section 1327(b) is the mechanism which allows a creditor to avail itself of the exception. A basic tenet of statutory construction mandates that when two parts of a statute appear to conflict, courts should read the statute to give effect to all parts, whenever possible. *In re Evans*, 336 B.R. 749, 755 (Bankr. S.D. Ohio 2006) (citing *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991), *aff'd*, 504 U.S. 753 (1992). And "[i]n interpreting the language of a statute . . . we do not look at one word or one provision in isolation, but rather look to the statutory scheme for clarification and contextual reference. *United States v. McLemore*, 29 F.3d 1160, 1162 (11th Cir. 1994) (citing *Smith v. United States*, 113 S.Ct. 2050, 2056 (1993)).

In this case, sections 1327(a) and (b), and section 362(b) are irreconcilable. Prior to confirmation, a child support creditor is unable to attempt to collect child support from the debtor, because prior to confirmation, all property is the property of the estate;

section 362(b) allows for an exception from the stay only as to funds which are not part of the bankruptcy estate. Section 1327(b), which provides that following confirmation property revests with the debtor, allows a child support creditor to seek collection from the debtor, while section 1327(a) forbids collection of any debt not confirmed by the plan. The exception in section 362(b) cannot coexist with the confirmation effects of section 1327(a).

Another rule of statutory construction is that "if two statutes conflict, the more recent or more specific statute controls." *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948 (11th Cir. 2001) (citations omitted). Sections 362 and 1327 were both enacted on November 6, 1978; consequently neither section is afforded more weight. However, an amendment to the Bankruptcy Code in another section provides clarity as to the correct interplay of the various sections.

In *In re Jacobson*, the bankruptcy court explained the effect of the 1994 amendments to the Bankruptcy Code:

> Prior to the 1994 amendments to the Bankruptcy Code, Chapter 13 did not provide an effective method for paying past due support or maintenance obligations. Although such obligations were nondischargeable under 11 U.S.C. § 523 (a)(5), they were not given priority. As a result, they were treated as unsecured obligations within Chapter 13 plans and the plan was therefore subject to objection if it purported to pay such unsecured

> obligations more favorably than other similarly situated, though dischargeable, unsecured claims. This fact contributed to the long line of cases that limited involvement by the federal courts in the collection of alimony, maintenance, or support in Chapter 13 cases and that liberally granted relief from the stay to pursue alimony, maintenance or support obligations in the state courts notwithstanding the Chapter 13 case.

231 B.R. 763, 765 (Bankr. D. Ariz. 1999). The 1994 amendment created a new priority for domestic support obligations. *See* 11 U.S.C. § 507(a)(1);[2] *see Jacobson*, 231 B.R. at 765. Pursuant to 11 U.S.C. § 1322(a)(2), a Chapter 13 plan must provide for full payment of all claims entitled to priority under section 507. *Jacobson*, 231 B.R. at 765. Finally, 11 U.S.C. § 1328 provides that support obligations survive discharge upon completion of payments under a Chapter 13 plan. *Id.* As the *Jacobson* court explained, "[r]eading these several sections together, the conclusion is undeniable that Congress intended in 1994 to change the law such that maintenance and support obligations not only may, but must, be treated specially and paid in full under a Chapter 13 plan." *Id.*

Given the change in the treatment of domestic support obligations under a Chapter 13 plan, the exception found in section 362(b)(2)(B) is somewhat

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[2] The domestic support priority was originally a seventh priority; it has since become a first priority.

superfluous. Because a Chapter 13 plan must provide for any support obligations due by the debtor, there is no need for an exception to the automatic stay to allow for a child support creditor to pursue the action in state court.

The Division argues that the federal government has no place in domestic affairs, as domestic affairs belong to the laws of the states. (*See Appellant's Brief* at 14). While this has historically been the case, it is clear that Congress intended for the federal courts, through the Bankruptcy Code, to address the payment of domestic support obligations. This does not mean that the bankruptcy court determines the amount of support, or any other details of the domestic affairs; those remain governed by the state courts. Nevertheless, the Bankruptcy Code provides for the payment of those obligations, as a priority, under the debtor's Plan.

The facts of this case are comparable to those found in *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007). In *Gellington*, the State of Texas garnished the wages of a debtor owing child support. *Id.* at 502. The court found the state was not in violation of the automatic stay because 11 U.S.C. § 362(b)(2)(B) created an exception to the stay. However, the court found the state was in violation of the confirmation order, as it was bound by the provisions therein pursuant to 11 U.S.C. § 1327(a). *Id.*

The same result is warranted here. While the Division did not violate the automatic stay provisions,

it nonetheless violated the terms of the debtor's confirmed Plan. The bankruptcy court therefore did not commit error in finding the Division in contempt and awarding attorney's fees against it in favor of Rodriguez.[3]

C. Eleventh Amendment Immunity

The Division argues that if the Court finds it is subject to any sanctions from the bankruptcy court for any violations, it is nonetheless protected by Eleventh Amendment immunity. The Division concedes that 11 U.S.C. § 106(b) provides that the filing of a claim by the State against a debtor constitutes a waiver of sovereign immunity, and it acknowledges the Division filed a claim against Rodriguez in this case. The Division argues, however, that waiver under section 106(b) is narrow and applies only to the

[3] The Division argues that Rodriguez cannot demonstrate damages sufficient for an award under section 362(h) (now section 362(k)). However, the bankruptcy court awarded the fees for the Division's violation of section 1327(a). Moreover, the Eleventh Circuit in *In re Burke* found attorney's fees incurred in challenging the violations to be sufficient damages for an award against the State. *See In re Burke*, 146 F.3d, 1313, 1320, n.12 (11th Cir. 1998). In this case, the bankruptcy court awarded additional damages against the Division for what it found to be a willful violation of the automatic stay by sending the demand letters to Rodriguez. Because the court allowed the Division to purge itself of those sanctions by sending no additional letters, the bankruptcy court's finding of a violation of the stay is moot.

estate itself, and not to the debtor. Section 106(b) provides that

> [a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 106(b). The Division contends that the sanctions imposed against it by the bankruptcy court is a claim belonging to the debtor, not to the bankruptcy estate. The Division claims it has not waived immunity as to Rodriguez and is therefore protected against any claims by Rodriguez against it.

The Division acknowledges that the Eleventh Circuit, when faced with a comparable scenario as that at issue here, found the State had waived its sovereign immunity for purposes of the bankruptcy court imposing sanctions against the State for violating the automatic stay and discharge injunction. *See Georgia Dep't of Revenue v. Burke (In re Burke)*, 146 F.3d 1313 (11th Cir. 1998). But the Division contends that the court in *Burke* did not address the language of section 106(b), and the case is therefore distinguishable from the instant case.

It is true that *Burke* did not address the specific language of section 106(b). The court specifically stated: "[w]e note at the outset of this section that our waiver analysis is not based on 11 U.S.C. § 106(b)." Instead,

the court relied upon the Supreme Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The court began its analysis by noting that while the State of Georgia had not explicitly consented to waive its immunity, "a state may consent to a federal court's jurisdiction through its affirmative conduct." *Burke*, 146 F.3d at 1318. The court then examined the *Gardner* opinion, which addressed the effect of filing a proof of claim in a bankruptcy proceeding upon a state's assertion of Eleventh Amendment immunity. *Id.* The court quoted *Gardner's* reasoning:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court
>
> > by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. . . . When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Id. at 1319.

The Eleventh Circuit determined that the reasoning of *Gardner* applied to the two cases before it, and found that in both cases the state had waived its immunity from enforcement action by the bankruptcy

court by virtue of having filed proofs of claim. The court explained, reciting facts remarkably close to the case at hand, that

> by filing a proof of claim in the debtors' respective bankruptcy proceedings, the State waived its sovereign immunity for purposes of the adjudication of those claims. We hold that this waiver includes the bankruptcy court's enforcement of the discharge injunction and the automatic stay in the instant cases. We believe that the enforcement of the bankruptcy court's orders in both of the instant cases falls easily within the waiver of immunity "respecting the adjudication of the claim" found by the Supreme Court in *Gardner*, 329 U.S. at 574, 67 S. Ct. at 472. We emphasize that our holding regarding the State's waiver of Eleventh Amendment immunity is quite narrow because the debtors seriously seek to recover only the costs and attorneys' fees incurred in enforcing the bankruptcy court's automatic stay and discharge injunction. Therefore, addressing only the live issues in this case, we hold that the State of Georgia has waived its Eleventh Amendment immunity to the extent of the attorneys' fees and costs incurred by the debtors in enforcing the bankruptcy court's automatic stay and discharge injunction.

Id. at 1319-20 (internal footnote omitted).

The Division argues that the Eleventh Circuit misinterpreted *Gardner* and reached an improper result. The Court disagrees, and moreover, is bound by Eleventh Circuit precedent. Accordingly, the Division waived its Eleventh Amendment immunity to the extent of the attorney's fees awarded by the bankruptcy court.[4]

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the bankruptcy court's February 6, 2009 Order is **AFFIRMED**. The Clerk of the Court is instructed to **CLOSE** this case and all pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers, at Miami, Florida, this 12th day of June, 2009

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

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[4] The Division also argues that 11 U.S.C. § 106(a) is unconstitutional in that it forces a state to abrogate its Eleventh Amendment immunity. The constitutionality of section 106(a) has recently been at issue before the Supreme Court, and that Court deemed it constitutional. *See, e.g.*, *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356 (U.S. 2006).

[SEAL]

ORDERED in the Southern District of Florida on February 06, 2009.

UNITED STATES BANKRUPTCY COURT
SOUTHERN [DISTRICT] OF FLORIDA
MIAMI DIVISION

/s/ A. Jay Cristol
A. Jay Cristol
United States Bankruptcy Court

In Re:	**PROCEEDINGS UNDER**
Daniel Rodriguez	**CHAPTER 13**
Debtor /	**Case No: 05-10255-AJC**

ORDER GRANTING DEBTOR'S MOTION FOR CONTEMPT

(Filed Feb. 6, 2009)

This cause came on for hearing on the 4th day of February, 2009 on Debtor's Amended Motion for Contempt against the state of Florida. The court having heard argument of counsel having reviewed the file and being otherwise fully advised in the premises it is:

ORDERED AND **ADJUDGED:**

1. Before the court appeared Joel Knee, Esquire who represented the state of Florida Department of Revenue, his client, as a stellar advocate. The court notes Mr. Knee's outstanding civility and conscientiousness.

2. The court makes a specific finding that Mr. Knee had no responsibility in the stay violations.

3. The court finds that for the reasons stated on the record that the state of Florida is not entitled to claim Sovereign Immunity as it has filed a proof of claim in this case and therefore, waived Sovereign Immunity for all purposes including the claim of the Debtor for violation of 11 U.S.C. 362.

4. Pursuant to 11 U.S.C. 106(a) no punitive damages are being awarded.

5. Debtor's Motion for Contempt is granted.

6. The court finds the state of Florida to have violated the automatic stay on three separate occasions by virtue of the three (3) letters it sent to the Debtor.

7. The court finds that the intangible worry caused to the Debtor by the DOR's letters are sufficient damages under 11 U.S.C. 362(h). Notwithstanding, the court finds that attorney fees are sufficient damages which are able to be awarded against the state of Florida under 362(h) without actual damages being sustained by the Debtor.

8. The court finds the state of Florida to be in violation of the automatic stay and in civil contempt. The court fines the state of Florida $10,000.00 for each of the three stay violations, but the state may purge this fine by not sending any further letters to the Debtor in violation of the stay.

9. The court awards attorney's fees against the state of Florida.

10. If the parties are not able to agree on the amount of attorney fees awarded, the court shall hold a further hearing to determine same.

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Copies Furnished:

Freire & Gonzalez, Esq.
Daniel Rodriguez, Debtor
Nancy N. Herkert, Trustee
Joel S. Knee, Assistant General Counsel

The movant, or movant's counsel Freire & Gonzalez, P.A., shall serve a copy of this notice and unless previously served, the above described pleading to all required parties and within the time frames required by the Federal Rules of Bankruptcy Procedure, local rules, or orders of the court, and shall file this original notice and completed certificate of service.